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IN THE

Supreme Court of the United States

OCTOBER TERM—1946.

No. 482

WATERMAN STEAMSHIP CORPORATION,

Petitioner,

versus

U. S. SMELTING, REFINING & MINING CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

and

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

HARRY F. STILES, JR.,
JAMES J. MORRISON,
Proctors for Petitioner.

DEUTSCH, KERRIGAN & STILES,
Of Counsel.

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versus

U. S. SMELTING, REFINING & MINING CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit entered on May 24, 1946, rehearing denied June 18, 1946, affirming the decree of the District Court of the United States for the Eastern District of Louisiana entered on September 20, 1945, which Court denied a rehearing on October 24, 1945.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, filed on May 24, 1946, is re-

ported in 155 Fed. (2d) 687 (Advance Sheet August 5, 1946), 1946 AMC 997 (June Advance Sheets). Petition for rehearing was denied on June 18, 1946, without opinion.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. 347.

The opinion of the Circuit Court of Appeals for the Fifth Circuit was filed and the decree of said Court entered on May 24, 1946; petition for rehearing was filed June 7, 1946 and denied, without opinion, on June 18, 1946.

QUESTIONS PRESENTED.

The fundamental question presented in this petition is whether, under the language of the covering bill of lading, the rights and liabilities of petitioner, as a common carrier of goods by sea, are governed by the provisions of the Carriage of Goods by Sea Act or by the jurisprudence of the courts of the United States dealing with loss of deck cargo.

The pertinent clauses of the covering bill of lading[1] provide as follows:

> Section 1. "* * * The terms 'Owner's Risk' and 'O. R.' mean that carrier shall not be liable

[1] R. 8, 15.

for loss or damage unless shown to have resulted from some negligence or default of carrier against liability for which it is precluded by law from contracting."

Section 3. "This bill of lading shall be deemed to incorporate and shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, and nothing herein contained shall be deemed a surrender by Carrier of any of its rights or immunities or an increase of any of the responsibilities or liabilities thereunder; nor shall Carrier be deemed to have warranted the seaworthiness of the Vessel. The provisions stated in said Act shall (except as may be otherwise provided herein) govern before the Goods are loaded on and after they are discharged from the ship and throughout the entire time that they are in the custody of the Carrier. In respect of Goods carried on deck and stated herein to be so carried, all risks of loss or damage by perils incident to such carriage shall be borne by Cargo Owner but in all other respects the custody and carriage of such Goods shall be governed by the terms of this bill of lading and except as otherwise herein provided, by the provisions stated in said Carriage of Goods by Sea Act notwithstanding Section 1 (c) thereof. Carrier shall also have the benefit of Sections 181 to 189 inclusive, of Title 46, U. S. Code, and of all other statutes of the United States or any other country which may be applicable in the circumstances to grant Carrier exemption from or limitation of liability.

"Provided further, that if this bill of lading be issued for goods shipped from any port or place in Canada it shall have effect subject to the provisions of the rules relating to bills of lading contained in and as applied by the Canadian Water Carriage of Goods Act, 1936."

Section 22. "* * * Live animals and Goods carried on deck shall be at Owner's risk."

SUMMARY STATEMENT.

An *in personam* action was brought in admiralty by U. S. Smelting, Refining & Mining Co., as owner of the cargo lost, against Waterman Steamhip Corporation, as owner of the carrying vessel.

Libelant's entire shipment, consisting of 698 pieces of prefabricated structural steel, was loaded aboard the Steamship WEST KYSKA at Baltimore, Maryland, and was destined for Nome, Alaska, but the undertaking of petitioner was to carry it only as far as Seattle, Washington, where it was to be transshipped to a vessel of another ocean carrier. Of the shipment, 771 tons were loaded on deck and this was so stated on the face of the covering bill of lading.

The Steamship WEST KYSKA sailed from Baltimore, Maryland, on March 25, 1941. After calling at various ports of the United States and while enroute from Oakland, California, to Seattle, Washington, she ran into a heavy cross sea which caused her to roll and labor heavily.

At 8:37 a. m., on May 3, 1941, the vessel, as a result of having been struck on her port beam by an exceptionally large wave, gave a sharp and violent twist. The lashings of her #1 port deck stow came adrift and a portion of the stow went into the sea.

The libel was filed to recover the value of 13 pieces of steel thus lost.

Petitioner contended that, because the loss was of deck cargo, its rights and liabilities were governed by the decisions of our courts relating to carriage of goods on deck and that, therefore, it could not be held liable unless the cargo owner proved by a fair preponderance of evidence that the loss was caused by petitioner's negligence in the stowage and custody of the cargo. The District Court, in rendering a decree in favor of libellant, held that petitioner negligently failed to comply with the obligation imposed on a carrier under the provisions of Section 3 (2) of the Carriage of Goods by Sea Act.[2]

Petitioner appealed to the U. S. Circuit Court of Appeals for the Fifth Circuit and that Court held that the duties and liabilities of petitioner were governed, under the language of the covering bill of lading, by the Carriage of Goods by Sea Act. The Court did not decide the question of whether or not petitioner was negligent in the stowage and custody of the deck cargo[3] but, on the contrary, held that the burden was on petitioner to show that the loss occurred because of a reason for which it would be excused under the Carriage of Goods by Sea Act.[4]

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[2] 62 F. S. 511, 519, 1945 AMC 1215, 1229.
[3] 155 F. (2d) 687, 693, 1946 AMC 997, 1006.
[4] 155 F. (2d) 687, 691, 1946 AMC 997, 1003.

THE REASON FOR GRANTING THE PETITION.

The Circuit Court of Appeals for the Fifth Circuit has interpreted the language of Section 3 of the bill of lading to mean that the cargo owner and the ocean carrier contracted that their respective rights and liabilities as to deck cargo were to be governed by the provisions of the Carriage of Goods by Sea Act. The effect of this decision is that where deck cargo is carried under a bill of lading containing the language heretofore set out, the carrier is deprived of those rights and defenses to which he has been entitled since the inception of the maritime law of our nation.

The pertinent language in Section 3 is, for all practical purposes, the same language which is incorporated in the uniform North Atlantic Bill of Lading which was approved and put into general use by the Associated North Atlantic Freight Conferences on September 1, 1937.[5]

It is believed that practically all of the American steamship companies use language similar or nearly similar to the language used in the covering bill of lading under consideration here.

It is of importance to American ship owners and their insurers that the measure of an ocean carrier's liability

[5] Knauth, Ocean Bills of Lading, 1941, pages 81, 85. The language of the uniform North Atlantic bill of lading 1937 reads as follows, page 85: "In respect of goods carried on deck and stated herein to be so carried, all risks of loss or damage by perils inherent in such carriage shall be borne by the consignee but in all other respects the custody and carriage of such goods shall be governed by the terms of this bill of lading and the provisions stated in said Carriage of Goods by Sea Act notwithstanding Sec. 1(C) thereof."

under this bill of lading language be settled by this Court. A revitalized and vigorous American Merchant Marine in the hands of private carriers, following the extraordinary expansion of our merchant shipping during the recent war, requires that this matter be set at rest by highest authority.

If the duties and liabilities of an ocean carrier in respect to deck cargo are to be governed by the provisions of the Carriage of Goods by Sea Act, under the above quoted bill of lading language, then it is obvious that those duties and liabilities have been increased measurably over such duties and liabilities as previously defined by this Court and other courts of the United States.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

HARRY F. STILES, JR.,
JAMES J. MORRISON,

.....

Proctors for Petitioner.

DEUTSCH, KERRIGAN & STILES,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1946.

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WATERMAN STEAMSHIP CORPORATION,
Petitioner,

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U. S. SMELTING, REFINING & MINING CO.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

THE QUESTION OF LAW PRESENTED.

The question presented for the court's consideration is whether, under the covering bill of lading, the deck cargo of the WEST KYSKA was being carried subject to the provisions of the Carriage of Goods by Sea Act.[1]

The Act does not, by its own terms, apply to deck cargo.[2] Therefore, it can only apply if it has been made to do so by the contract of carriage.

Other than the holdings of the District Court and Circuit Court of Appeals for the Fifth Circuit in the instant case,

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[1] Act of April 16, 1936, c. 229, 49 Stat. 1207, 46 U. S. C. 1300.
[2] Act of April 16, 1936, Sec. 1, 49 Stat. 1208, 46 U. S. C. 1301 (c).

it is believed that there are no decisions interpreting the language contained in Section 3 of the bill of lading.

It is submitted that the language there contained not only does not make deck cargo carried under it subject to the Carriage of Goods by Sea Act, but under the circumstances of the instant loss, specifically provides that the Carriage of Goods by Sea Act shall not apply.

The clause provides that as to goods carried on deck, where it is stated in the bill of lading that they are to be so carried, all risks of loss or damage by perils incident to such carriage shall be borne by the cargo owner. Here, there is no dispute as to the facts (1) that the goods were carried on deck and (2) that the bill of lading so stated.

It is believed, also, that there cannot be any doubt as to the fact that the loss was sustained because of a peril incident to on-deck carriage. The chain lashings securing the No. 1 deck stow came adrift and part of this stow, i. e., 13 plates, slipped over the rail of the vessel.

Had the plates been stowed below decks, it is obvious that even though the lashings had come adrift, the plates would not have gone into the sea. To put it another way, the plates could not have gone overboard had they been stowed below decks and the fact that they did go overboard and were lost demonstrates conclusively that their loss was occasioned by a peril incident of deck carriage.

Therefore, the rights and liabilities of the parties are governed by the agreement between the shipper and the

carrier that these goods, carried on deck, were carried at owner's risk.

Under such an agreement, the only duty which the carrier owed the shipper was to properly stow the cargo, and the burden of showing that the deck cargo was either improperly stowed or inadequately secured is on the shipper.

In order for the interpretation of the bill of lading by the Circuit Court of Appeals for the Fifth Circuit to be justified, it is necessary to read out of the clause above quoted, the two phrases "but in all other respects" and "except as otherwise herein provided".

Apparently, the Court of Appeals for the Fifth Circuit has not taken these two phrases into consideration in arriving at the meaning of the clause, and it is contended that the language referred to is vital in order to correctly determine the meaning.

In addition to the language contained in Section 3 of the bill of lading, Section 1 provided, in part, as follows:

> "* * * The terms 'Owner's Risk' and 'O. R.' mean that carrier shall not be liable for loss or damage unless shown to have resulted from some negligence or default of carrier against liability for which it is precluded by law from contracting."

And Section 22 provided, in part, as follows:

> "* * * Goods carried on deck shall be at Owner's risk."

It is difficult to conceive how a contract could have been more explicit in fixing the rights and liabilities of the parties as to on-deck carriage.

If nothing had been stated in the bill of lading as to the terms under which deck cargo was carried, it is quite clear from the jurisprudence that the only obligation which the carrier owed the owner of the goods was to properly stow and adequately secure the deck cargo. It seems unreasonable to suppose that the carrier voluntarily took upon itself, by contract, a greater responsibility than that provided by law in the absence of contract.

THE EFFECT OF THE APPLICATION OF THE CARRIAGE OF GOODS BY SEA ACT TO DECK CARGO.

Should the Carriage of Goods by Sea Act be held to apply to deck cargo under the language of Section 3 of the bill of lading then the burden is upon the carrier to show that the loss or damage was due to a cause for which he may not be held liable under the Act and the carrier also has the risk of non-persuasion.[3]

On the contrary, if the Carriage of Goods by Sea Act be held not to apply, then the liability of the carrier for loss or damage to deck cargo is limited to those cases where the carrier is negligent in either the stowage or

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[3] Waterman Steamship Corporation v. U. S. Smelting, Refining & Mining Co.; Wigmore on Evidence, (3rd Ed.) Sec. 2508; Commercial Molasses Corp. v. N. Y. Tank Barge Corp., 314 U. S. 104, 109, 62 S. Ct. 156, 86 L. ed. 89 (1941); The Edwin I. Morrison, 153 U. S. 199, 212, 14 S. Ct. 823, 38 L. ed. 688 (1894).

custody of the cargo and the burden of proving such negligence is on the owner of the goods.

The distinction between the liability of an ocean carrier as to underdeck cargo and his liability as to deck cargo even in the absence of contractual exemption from liability, was recognized in this country as early as 1803, in the case of *Smith and Stanley v. J. and I. Wright.*[4] The testimony was reviewed in the following language:

> "Several eminent brokers, underwriters, and merchants were examined, and they all uniformly testified that goods on deck, if lost, are paid for by the underwriters on those goods, without contribution from the assurers of the vessel or other parts of the cargo; that there was no instance of an average or contribution allowed, when a loss happened in this way; that they never knew of any such case occurring between an owner of goods on deck and the owner of the vessel; that goods on deck always pay a higher premium, even in summer double, in winter, about 7 to 3, and less freight than goods under deck; the freight is less by one half, or two thirds, or thereabouts, but always less; that they never before heard of a demand of this kind made against the owner of a vessel by the shipper of goods; that the freight of goods on deck is less than when below, because they are not considered as at the risk of the owner of the vessel."

In holding for the vessel owner, the court said:

> "It is sufficient for our purpose that the usage has been against the allowance of average to goods placed on the deck of a vessel."

[4] 1 Caines 43 (N. Y.—1803).

In 1836, in the case of *The Paragon*[5] the court said:

> "And it may also be admitted to be proved that if the shipper consents to his goods being carried on deck, the master will not be liable for any loss or damage that is occasioned by the dangers of the seas. But this is no more than follows from the general principles of law, independent of any special custom. *Modus et convention vincunt regulam.* In any case, if the owner consents to his goods being carried on deck, the master will be exempted from his responsibility."

This court, in the celebrated case of *Lawrence v. Minturn*,[6] decided in 1855, declared:

> "But the maritime codes and writers have recognized the distinction between cargo placed on deck, with the consent of the shipper, and cargo under deck.
>
> "There is not one of them which gives a recourse against the master, the vessel, or the owners, if the property lost had been placed on deck with the consent of its owner; and they afford very high evidence of the general and appropriate usages, in this particular, of merchants and ship owners. Consolato, par Pardessus, ch. 186; Ord. de Mar. Valin, lib. 2, tit. 1, art. 12; Code du Com. Mar. par Locre, art. 229, lib. 2, tit. 4, art. 229; Emerigon, ch. 12, sec. 42; Boulay Paty, tom. 4, 566, 568."

While the three cases above cited involved jettisoning of deck cargo, it is nevertheless indicated from the lan-

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[5] 1 Ware 326, Fed. Cas. 10,708 (DC Me.-1836).
[6] 58 U. S. (17 How.) 100, 15 L. Ed. 58 (1855).

guage of the decisions that there could be no recovery by the cargo owner for loss of or damage to deck cargo no matter how caused.[7]

This principle was modified by later decisions holding that the vessel owner could not escape liability where the loss of deck cargo was due to faulty stowage, which rendered the vessel unseaworthy[8] or resulted in the stow itself being improperly secured.[9]

However, the burden of showing negligence in stowage of deck cargo was placed squarely on the owner of the goods. In the case of *The Taibu Maru,*[10] the court held:

> "It is to be observed that the libellant's brief asserts that an 'on deck at shipper's risk' bill of lading requires the claimant to use the care that an ordinarily prudent shipowner would exercise,

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[7] To the same effect: Wellington, 1 Biss. 279, 2 West L. Mthly. 523, Fed. Cas. 17,384 (DC Wis.-1859); Higgins v. Watson, 43 Hunt Mer. Mag. 69, Fed. Cas. 6470 (DC NY-1860); Talbot v. Wakeman, 25 Betts, DC MS 152, 19 How. Prac. 36, Fed. Cas. 13,731 (DC NY-1860); Milwaukee Belle, 2 Biss. 197, 9 ALR (ns) 311, 3 ALT Rep. US Cts. 65, 2 Chi. Leg. N. 50, 17 Pittsb. Leg. J. 148, Fed. Cas. 9,627 (DC Wis.-1869); See also The Thomas P. Thorn, 8 Ben. 3, Fed. Cas. 13,927 (DC NY-1857), where the Court said: "The question . . . is whether upon a contract to carry on deck, this vessel is liable for the wetting of this tobacco. It is manifest that the injury to the tobacco arose simply from the fact that it was carried on deck. . . . But, under a contract to carry upon deck, the risk of any damage resulting from the place of carriage rests upon the shipper . . . and, without proof of negligence causing the damage, there can be no recovery."

[8] Olsen v. United States Shipping Co., 213 Fed. 18 (CCA 2-1914); Royal Sceptre, 187 Fed. 224 (SD NY-1911); Barker v. The Swallow, 44 Fed. 771 (ND Ill.-1890); Colima, 82 Fed. 665 (SD NY-1897); Fleishman v. The John P. Best, 37 Leg. Int. 18, 8 Wkly. Notes Cas. 30, 14 Phila. 527, Fed. Cas. 4861 (ED Pa.-1879).

[9] U. S. Industrial Alcohol Co. v. Calmar S. S. Corp., 53 F. 2d 1023, 1931 AMC 1737 (SD NY-1931); rev'd on other grds., 57 F. (2d) 182, 1932 AMC 526 (CCA 2-1932); cert. den. 287 U. S. 622, 53 S. Ct. 21, 77 L. ed. 540, 1932 AMC 1484; Carlos, 237 Fed. 731 (ND Cal.-1916); Talbot v. Wakeman, 25 Betts, D. C. Ms. 152, 19 How. Prac. 36, Fed. Cas. 13,731 (SD NY-1860).

[10] 1930 A. M. C. 1065 (ED NY-1930).

and that the libellant must establish negligence affirmatively, as in the case of a bailment. This seems to be the basis of the decision in the case of Lawrence v. Minturn, 58 U. S. 100, at 115.

"The rule which will guide this decision is that, in an action by a bailor against a bailee, after the bailor has proved the loss, the burden of showing how the loss occurred is cast upon the bailee; when the bailee has shown these facts, the bailor has the burden of showing, by a fair preponderance of evidence, that the loss occurred by reason of the negligence of the bailee."

* * * * * * *

"The respondent having established the facts as to the loss of this portion of the deck cargo, it became the burden of the libellant to show, by fair preponderance of evidence, that the loss occurred by reason of the negligence of the claimant."

THE IMPORTANCE OF THE QUESTION PRESENTED.

As stated in the foregoing petition, the language in Section 3 of the bill of lading under consideration here is identical or similar to language used in the bills of lading of all American shipowners and a final decision on the question here presented is of vital consequence not only to shipowners but to cargo owners and insurers of both.

As pointed out over a hundred years ago in the case of *Smith and Stanley v. J. and I. Wright, supra,* and com-

paratively recently in the case of *The Carriso*,[11] deck cargo is carried at greatly reduced freight rates and on the other hand requires much larger insurance premiums. If the liability of a vessel owner as to deck cargo under the bill of lading here considered is to be the same as his liability for under deck cargo, then it would seem to follow that he must either alter the clause to eliminate any reference to the Carriage of Goods by Sea Act or adjust his rates upward for deck cargo.

Also, it is quite apparent that under the decision sought to be reviewed the insurer of the shipowner is exposed to a greater hazard in connection with losses occurring to deck cargoes.

Conversely, where the instant form of bill of lading is used, the position of the owner of cargo laden on deck and his insurer has been substantially improved.

There can be no doubt of the far reaching consequences of the decision sought to be reviewed.

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[11] The Carriso, 30 F. (2d) 279, 280, 1929 A. M. C. 213 (CCA 9-1929); cert. den. 279 U. S. 853, 49 S. Ct. 348, 73 L. ed. 996 (1929).

CONCLUSION.

Petitioner believes that, the record will show that the cargo owner has failed to sustain the burden of proving that the loss in suit was caused by the negligence of petitioner in failing to properly stow and adequately secure the deck cargo.

In view of the importance of the subject matter to American shipping interests and in view of what petitioner conceives to be manifest error in the decree below, it is urged that the writ prayed for herein should be granted.

Respectfully submitted,

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HARRY F. STILES, JR.,
JAMES J. MORRISON,

Proctors for Petitioner.

DEUTSCH, KERRIGAN & STILES,
Of Counsel.